Supreme Court, U.S.
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No. 01-1520

IN THE

Supreme Court of the United States

CARNELL A. SMITH,

Petitioner,

v.

TONI W. ODUM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is every cognizant State Court, when presented with uncontroverted, credible genetic testing evidence of non-paternity, required to render void for want of subject matter jurisdiction, the previous, underlying, judgment of paternity?

2. Upon a finding by the cognizant State Court that a previous judgment of paternity is void, must that Court Order the refund to the newly-proven non-father, of all child support, whether court ordered or voluntarily paid while under mistaken belief of paternity, collection expenses, and court expenses?

LIST OF PARTIES

Petitioner Carnell A. Smith, is a resident and citizen of the State of Georgia and of the United States of America.

Respondent Real Party in Interest Toni W. Odum was at all pertinent times, a resident and citizen of the State of Georgia and of the United States of America.

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STATUTORY BASIS FOR SUPPLEMENTAL BRIEF

This Brief Supplemental to the Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia is filed pursuant to Supreme Court Rule 15.8, to call attention to new legislation not available at the time of the filing of the Petition for Writ of Certiorari.

ARGUMENT

The judgment of the Georgia Supreme Court was entered on January 9, 2002. The petition for writ of certiorari was filed on April 9, 2002. On May 9, 2002, the Governor of Georgia signed into law House Bill 369 as passed House and Senate, which becomes effective on July 1, 2002.

As shown by the dates in the preceding paragraph, this new legislation was not available at the time of the filing of the Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, and therefore this Supplemental Brief drawing attention to the new legislation is filed with the Court.

The new legislation is here reproduced verbatim and in its entirety:

"A BILL TO BE ENTITLED AN ACT

To amend Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, so as to provide for a motion to set aside a determination of paternity based on newly discovered evidence regarding paternity of a child; to provide requirements for filing such a motion; to provide that relief on such motion shall be granted if genetic testing

conclusively shows that the alleged father is not the biological father of the child and certain other conditions are met; to provide that such relief shall not be denied because of the prior occurrence of certain acts unless the alleged father acted with knowledge that he was not the biological father; to provide for additional testing; to provide for costs; to provide for relief; to provide for matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 3 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to determination of paternity, is amended by adding after Code Section 19-7-53, relating to confidentiality of hearings, a new Code section to read as follows:

"19-7-54.

(a) In any action in which a male is required to pay child support as the father of a child, a motion to set aside a determination of paternity may be made at any time upon the grounds set forth in this Code section. Any such motion shall be filed in the superior court and shall include:

(1) An affidavit executed by the movant that the newly discovered evidence has come to movant's knowledge since the entry of judgment; and

(2) The results from scientifically credible parentage-determination genetic testing, as authorized under Code Section 19-7-46 and administered within 90 days prior to the filing of such motion, that finds that there is a 0 percent probability that the male ordered to pay such child support is the father of the child for whom support is required.

(b) The court shall grant relief on a motion filed in accordance with subsection (a) of this Code section upon a finding by the court of all of the following:

(1) The genetic test required in paragraph (2) of subsection (a) of this Code section was properly conducted;

(2) The male ordered to pay child support has not adopted the child;

(3) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock;

(4) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child; and

(5) The male ordered to pay child support with knowledge that he is not the biological father of the child has not:

(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;

(B) Acknowledged his paternity of the child in a sworn statement;

(C) Been named as the child's biological father on the child's birth certificate with his consent;

(D) Been required to support the child because of a written voluntary promise;

(E) Received written notice from the Department of Human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded;

(F) Signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or

(G) Proclaimed himself to be the child's biological father.

(c) In the event movant fails to make the requisite showing provided in subsection (b) of this Code section, the court may grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law.

(d) In the event relief is granted pursuant to subsection (b) of this Code section, relief shall be limited to the issues of prospective child support payments, past due child support payments, termination of parental rights, custody, and visitation rights.

(e) The duty to pay child support and other legal obligations for the child shall not be suspended while the motion is pending except for good cause shown; however, the court may order the child support be held in the registry of the court until final determination of paternity has been made.

(f)(1) In any action brought pursuant to this Code section, if the genetic test results submitted in accordance with paragraph (2) of subsection (a) of this Code section are provided solely by the male ordered to pay child support, the court on its own motion may, and on the motion of any party shall, order the child's mother, the child, and the male ordered to pay child support to submit to genetic tests. The court shall provide that such genetic testing be done no more than 30 days after the court issues its order.

(2) If the mother of the child or the male ordered to pay child support willfully fails to submit to genetic testing, or if either such party is the custodian of the child and willfully fails to submit the child for testing, the court shall issue an order determining the relief on the motion against the party so failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, such failure shall not be considered willful.

(3) The party requesting genetic testing shall pay any fees charged for the tests. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, such agency shall pay the cost of genetic testing

if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(g) If relief on a motion filed in accordance with this Code section is not granted, the court shall assess the costs of the action and attorney's fees against the movant.

SECTION 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed."

This new legislation is directly relevant to the first question presented by Petitioner. It makes non-discretionary the setting aside of a judgment of paternity where a man adjudged to be the father of a child can show, by scientifically credible parentage-determination genetic testing, that he is not in fact the father, and where he has not adopted the child nor prevented the biological father from asserting his parental rights with respect to the child. Relief under the statute is not mandatory where the man is not the biological father because the child was conceived through artificial insemination while the man was married to the mother.

The statute also mandates relief where the man has *not* taken affirmative actions "with knowledge that he is not the biological father of the child"; to wit: married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support; acknowledged his paternity of the

child in a sworn statement; been named as the child's biological father on the child's birth certificate with his consent; been required to support the child because of a written voluntary promise; received written notice from the Department of human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded; signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or proclaimed himself to be the child's biological father. Relief, in the form of setting aside a judgment of paternity, is available to a man who has taken these actions *without* the "knowledge that he is not the biological father of the child." As set forth in the facts supporting the Petition for Writ of Certiorari, Petitioner was without knowledge that he was not the biological father of the child, because of fraudulent statements and concealments by the Mother of the child.

However, where the father cannot make the showing required for mandatory relief, the Court can order discretionary relief, including none at all. A man would fail to qualify for mandatory relief under the statute because he took certain actions, with knowledge that he is not the biological father of the child, because of the prior law in the State of Georgia, which potentially barred any relief if the man did not act with "due diligence." Therefore, the passing of this new legislation, which addresses the first question presented by Petitioner, nonetheless does not render this issue moot. The question is appropriate and timely for consideration by this Court.

The statute does not address Petitioner's second question, but does not prevent the relief sought therein. Relief for actions filed under this statute are "limited to the issues of *prospective* child support payments, past due child support payments, termination of parental rights, custody, and visitation rights (emphasis added)" if the moving father qualifies for *mandatory* relief. If the father, for whatever

reason, fails to qualify for mandatory relief, the court has discretion to "grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law." One aspect of Petitioner's second question presented to this Court, and the argument in support thereof as set forth in the Petition for Writ of Certiorari, is whether a court ever had subject matter jurisdiction over a man who is not in fact the biological father of the child, such that any orders or judgments directed to this man concerning paternity were void *ab initio*, and therefore any child support paid by the man should be refunded. The statute does not address at all the situation where a man has been providing support for a child that he believed was his biological child because of misrepresentations or concealment of facts by the Mother of the child. If this Court were to answer Petitioner's second question in the affirmative, it would provide identical relief for men whose paternity was adjudicated and whose obligations were set by a Court, and for men whose paternity was assumed by them and whose obligations were undertaken voluntarily, under the facts known to them at the time.

CONCLUSION

Georgia will have, beginning July 1, 2002, a statute that provides some of the relief sought by the Petitioner. This Court should be aware of the passage and enactment of this new legislation, which directly addresses the subject matter of the questions presented to this Court. The newly enacted law does not moot the questions presented by Petitioner in his Petition for Writ of Certiorari. The Court should answer the questions presented by Petitioner in the affirmative, and grant relief as it deems appropriate.

Respectfully submitted,

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